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8 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 ROBERT PETTY,

11 Plaintiff,

12 v.

13 NANCY A BERRYHILL, Acting  
Commissioner of Social Security,

14 Defendant.  
15

CASE NO. 3:17-CV-05129-JLR-DWC

REPORT AND RECOMMENDATION

Noting Date: August 25, 2017

16 Plaintiff Robert Petty filed this action, pursuant to 42 U.S.C. § 405(g), for judicial review  
17 of Defendant's denial of his application for supplemental security income ("SSI").<sup>1</sup> The District  
18 Court has referred this action, filed pursuant to 42 U.S.C. § 405(g), to United States Magistrate  
19 Judge David W. Christel.  
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21  
22 <sup>1</sup> In the conclusion of Plaintiff's Opening Brief, he also asserts the ALJ's decision to deny his application  
23 for disability insurance benefits ("DIB") contains errors of law and this Court should remand for "a full and fair  
24 consideration." *See* Dkt. 11 at 11. In denying Plaintiff's DIB application, the ALJ found the record devoid of any  
treatment record or medically determinable impairment prior to December 31, 2001, the date Plaintiff last met the  
insured status requirement of the Social Security Act. Dkt. 9, Administrative Record ("AR") 23. Plaintiff does not  
dispute this finding. *See* Dkt. 11, 13. Therefore, the undersigned recommends this Court construe Plaintiff's appeal  
as an appeal only of his denied SSI application and not of his denied DIB application.

1 After considering the record, the undersigned concludes the Administrative Law Judge  
2 (“ALJ”) erred when he failed to properly consider the medical opinion evidence of treating  
3 physician Dr. Vigeland. Had the ALJ properly evaluated the medical opinion evidence, the  
4 residual functional capacity (“RFC”) may have included additional limitations. Therefore, the  
5 ALJ’s error is harmful and the undersigned recommends the Court vacate the Commissioner’s  
6 final decision in its entirety and remand this matter pursuant to sentence four of 42 U.S.C. §  
7 405(g) for a *de novo* hearing consistent with this Report and Recommendation.

#### 8 FACTUAL AND PROCEDURAL HISTORY

9 On December 19, 2012, Plaintiff filed an application for DIB and SSI, alleging disability  
10 as of December 31, 1999. AR 21. The application was denied upon initial administrative review  
11 and on reconsideration. AR 21. Plaintiff filed a written request for a hearing on November 26,  
12 2013. AR 21.

13 ALJ Vadim Mozyrsky heard the matter on March 24, 2015. *See* AR 39–64. In a decision  
14 dated July 7, 2015, the ALJ determined Plaintiff to be not disabled. *See* AR 21–33. The Appeals  
15 Council denied Plaintiff’s request for review of the ALJ’s decision, making the ALJ’s decision  
16 the final decision of the Commissioner. *See* AR 1–9; 20 C.F.R. §§ 404.981, 416.1481.

17 In Plaintiff’s Opening Brief, he maintains the ALJ erred by: (1) rejecting the opinion of  
18 treating physician Dr. Ted Vigeland, M.D.; (2) failing to fully develop the record by ordering a  
19 consultative physical examination of Plaintiff; and (3) omitting a limitation from the residual  
20 functional capacity (“RFC”) assessment to account for Plaintiff’s cane use. *See* Dkt. 11, p. 1.

#### 21 STANDARD OF REVIEW

22 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s denial of  
23 social security benefits if the ALJ’s findings are based on legal error or not supported by  
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substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

### DISCUSSION

#### **I. Whether the ALJ properly weighed the medical opinion evidence.**

Plaintiff contends the ALJ erred in his evaluation of the medical opinion evidence of treating physician Dr. Vigeland. Dkt. 11 at 3–7; Dkt. 13 at 3–4. Defendant asserts Plaintiff is simply asking for a different interpretation of the evidence within the record. Dkt. 12 at 11.

The ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted opinion of either a treating or examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996) (citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988); *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990)). When a treating or examining physician’s opinion is contradicted, the opinion can be rejected “for specific and legitimate reasons that are supported by substantial evidence in the record.” *Lester*, 81 F.3d at 830–31 (citing *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995)); see also *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989) (“Substantial evidence means more than a mere scintilla but less than a preponderance. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”) (internal quotations omitted). The ALJ can accomplish this by “setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes*, 881 F.2d at 751).

Dr. Vigeland completed a clinician’s report of disability of Plaintiff on June 18, 2014. AR 227–30. Therein, he conducted a physical examination of Plaintiff and opined Plaintiff was physically able to return to work with limitations of no stooping and no climbing, and with a

1 lifting restriction of twenty pounds. AR 227. Dr. Vigeland further indicated “time loss” was  
2 “authorized” from June 18 to July 16, 2014, and that Plaintiff should return for another  
3 appointment in one month. AR 227.

4 In his decision, the ALJ gave this opinion little weight, stating:

5 The undersigned assigns limited weight to this opinion because (1) Dr. Vigeland  
6 did not indicate that this is a permanent work restriction. (2) Dr. Vigeland’s  
7 opinion is inconsistent with the stable condition he reported at Exhibits 4F and  
8 14E) [sic]. Most importantly, (3) Dr. Vigeland’s opinion is inconsistent with  
9 claimant’s school activity as well as the insignificant findings the recent  
10 radiographical and physical examinations showed at Exhibits 4F and 5F.  
11 Specifically, Dr. Vigeland’s opinion regarding the claimant’s preclusion from  
12 stooping as well as 20 pounds lifting and carrying restriction is inconsistent with  
13 the 60 pound tools the claimant has to carry around in school and engage in [sic]  
14 welding activities in school. The claimant reported no limitation regarding his  
15 inability to stoop. Finally, (4) the jobs which [sic] the vocational expert mentioned  
16 in his testimony do not require climbing ladders, ropes, or scaffolding.

17 AR 31 (numbering added).

18 The ALJ’s first reason to give Dr. Vigeland’s opinion little weight, that Dr. Vigeland did  
19 not indicate his opined limitations are permanent, is not a specific and legitimate reason to  
20 discount the opinion. Defendant maintains, citing *Carmickle v. Commissioner, Social Security*  
21 *Administration*, an ALJ may reject opinions of temporary limitations because they have little  
22 bearing on a claimant’s long-term functioning. Dkt. 12 at 5; *Carmickle v. Comm’r of Soc. Sec.*  
23 *Admin.*, 533 F.3d 1155 (9th Cir. 2008). In *Carmickle*, the Ninth Circuit affirmed the ALJ’s  
24 decision to give little weight to a treating physician’s opined limitation when the physician gave  
the plaintiff a two-week excuse from work due to degenerative disc disease, and two months  
later released the plaintiff to return to full-time work. *Id.* at 1165.

In the present case, Dr. Vigeland’s opinion indicated the time loss authorization for his  
opined limitations was for one month. AR 227. He also indicated Plaintiff was to return for  
another appointment at that time. AR 227. The treatment notes show Plaintiff returned for

1 another appointment with Dr. Vigeland on July 16, 2014. AR 626. At that time, Dr. Vigeland  
2 opined Plaintiff was “doing well,” with a “normal gait” and was “OK to discharge to routine prn  
3 followup.” AR 626. However, Dr. Vigeland lifted none of his previously opined limitations or  
4 stated said limitations were temporary. AR 626. The ALJ does not cite, nor does the Court find,  
5 any evidence in Dr. Vigeland’s opinion or elsewhere in the record where he stated his opined  
6 limitations were temporary, or where he lifted some or all of his opined limitations. Because  
7 substantial evidence in the record does not support a finding that Dr. Vigeland’s opined  
8 restrictions and limitations were temporary, this reason to discount Dr. Vigeland’s opinion is not  
9 specific and legitimate.

10 The ALJ’s second reason to give Dr. Vigeland’s opinion little weight, that it is  
11 inconsistent with “the stable condition he reported at Exhibits 4F and 14E,” is also not a specific  
12 and legitimate reason to discount the opinion. AR 31. Discrepancies between a doctor’s  
13 functional assessment and his clinical notes, recorded observations, and other comments  
14 regarding a claimant’s capabilities “is a clear and convincing reason for not relying” on the  
15 assessment. *Bayliss*, 427 F.3d at 1216; *see also Weetman v. Sullivan*, 877 F.2d 20, 23 (9th Cir.  
16 1989). However, an ALJ’s written decision must state reasons for disregarding significant,  
17 probative evidence. *See Flores v. Shalala*, 49 F.3d 562, 571 (9th Cir. 1995). As the Ninth Circuit  
18 has stated:

19 To say that medical opinions are not supported by sufficient objective findings or  
20 are contrary to the preponderant conclusions mandated by the objective findings  
21 does not achieve the level of specificity our prior cases have required, even when  
22 the objective factors are listed seriatim. The ALJ must do more than offer his  
23 conclusions. He must set forth his own interpretations and explain why they,  
24 rather than the doctors’, are correct.

*Embrey*, 849 F.2d at 421–22 (internal footnote omitted).

1 Here, the ALJ provided a conclusory statement finding Dr. Vigeland's opinion  
2 inconsistent with his reports in the opinion and treatment notes. AR 31. The ALJ failed to  
3 identify and discuss the specific evidence contained within the 605-page Portland Veterans'  
4 Affairs Medical Center ("VAMC") treatment records (Exhibit 4F) or Dr. Vigeland's opinion  
5 (14E) that he relied on to conclude Dr. Vigeland reported that Plaintiff's condition was stable.  
6 AR 31. Further, the ALJ has failed to explain how Dr. Vigeland's opinion is contradicted by  
7 these findings. The ALJ's vague, conclusory reference to Dr. Vigeland's reports of Plaintiff's  
8 "stable condition" in the treatment notes and opinion does not reach the level of specificity  
9 necessary to justify rejecting the opinion and is insufficient for this Court to determine if the ALJ  
10 properly considered the evidence. Without more, the ALJ has failed to meet the level of  
11 specificity required to reject a physician's opinion. *See McAllister v. Sullivan*, 888 F.2d 599, 602  
12 (9th Cir. 1989) (an ALJ's rejection of a physician's opinion on the grounds that it was contrary to  
13 clinical findings in the record was "broad and vague, failing to specify why the ALJ felt the  
14 treating physician's opinion was flawed."). Therefore, this is not a specific and legitimate reason  
15 for discounting Dr. Vigeland's opinion.

16 The ALJ's third reason for discounting Dr. Vigeland's opinion is that it is inconsistent  
17 with claimant's school activity as well as "the insignificant findings" contained in "the recent  
18 radiographical and physical examinations showed at Exhibits 4F and 5F." AR 31. Specifically,  
19 the ALJ discounts Dr. Vigeland's opined stooping, lifting, and carrying restrictions because they  
20 are "inconsistent with the 60 pound tools the claimant has to carry around in school" and use  
21 during welding activities, and because Plaintiff did not report a stooping limitation. AR 31.

22 The ALJ's initial conclusory statement finding Dr. Vigeland's opinion inconsistent with  
23 Plaintiff's school activity as well as "the insignificant findings" contained in "the recent  
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1 radiographical and physical examinations” does not reach the level of specificity necessary to  
2 justify rejecting the opinion. *See McAllister*, 888 F.2d at 602; *see also Blakes ex rel. Wolfe v.*  
3 *Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003) (“We require the ALJ to build an accurate and  
4 logical bridge from the evidence to [his] conclusions[.]”).

5       The ALJ also supports his third reason for discounting Dr. Vigeland’s opinion with two  
6 specific rationales. The ALJ’s first rationale for discounting Dr. Vigeland’s opined restrictions is  
7 because they are “inconsistent with the 60 pound tools the claimant has to carry around in  
8 school” and use during welding activities. AR 31. However, this statement is not supported by  
9 the record. At the time of the hearing, Plaintiff attended Clark College in Vancouver,  
10 Washington. *See* AR 44. Plaintiff testified he was enrolled at Clark College in a “modified  
11 welding program” working towards a degree in “welding technology.” AR 46. With regard to  
12 Plaintiff’s school activity abilities, Plaintiff testified that during class, he would utilize one of  
13 three welding booths set up in the quieter section of the welding shop. AR 47. He further  
14 testified that a “fellow vet” who had previously volunteered to help Plaintiff would carry his  
15 welding tools for him and place the tools in his booth before he arrived. AR 47, 53–54. When the  
16 ALJ asked how much the tools weigh, Plaintiff responded, “sixty pounds.” AR 54. The ALJ  
17 replied, “[o]kay. So that would be too much.” AR 54.

18       In giving little weight to Dr. Vigeland’s opined limitations, the ALJ relied on the above  
19 testimony only to the extent that it established that Plaintiff’s welding tools weigh sixty pounds.  
20 AR 31. Elsewhere in the decision, the ALJ disregarded the remainder of this testimony because  
21 he found “no evidence in the record” to support Plaintiff’s testimony that he receives special  
22 accommodation at the welding class due to his alleged disability, and further found Plaintiff’s  
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1 testimony to be not fully credible due to various “inconsistencies [and] deficits” in the record.  
2 AR 30–31.

3       However, in discounting Dr. Vigeland’s opined limitations, the ALJ failed to discuss any  
4 evidence that affirmatively supports the ALJ’s conclusion that Plaintiff is able to carry and use  
5 his sixty-pound welding tools in school and during welding activities. AR 31. Accordingly, the  
6 undersigned concludes even if the ALJ properly set aside Plaintiff’s subjective testimony, his  
7 finding that Plaintiff is able to carry and use his sixty-pound tools is not supported by substantial  
8 evidence. *See Embrey*, 849 F.2d at 421–22 (“it is incumbent on the ALJ to provide detailed,  
9 reasoned, and legitimate rationales for disregarding the physicians’ findings[;]” conclusory  
10 reasons do “not achieve the level of specificity” required to justify an ALJ’s rejection of an  
11 opinion). Therefore, this rationale for discounting Dr. Vigeland’s opined stooping, lifting, and  
12 carrying limitations is invalid.

13       The ALJ’s second rationale for discounting Dr. Vigeland’s opined restrictions for  
14 inconsistencies with Plaintiff’s school activity and “the recent radiographical and physical  
15 examinations” is that Plaintiff reported no inability to stoop. AR 31. The ALJ is entitled to  
16 resolve conflicts in the medical evidence. *Sprague v. Bowen*, 812 F.2d 1226, 1230 (9th Cir.  
17 1987). He may not, however, substitute his own opinion for that of qualified medical experts.  
18 *Doane v. Astrue*, 2010 WL 3672411, at \*4 (W.D. Wash. Aug. 17, 2010), *report and*  
19 *recommendation adopted*, 2010 WL 3672357 (W.D. Wash. Sept. 15, 2010).

20       In rejecting Dr. Vigeland’s opined stooping limitation, the ALJ does not discuss specific  
21 evidence in the record that illustrates Plaintiff is able or unable to stoop, nor discuss Dr.  
22 Vigeland’s clinical observations that led to his conclusion that Plaintiff cannot stoop. AR 31. The  
23 ALJ’s vague, conclusory reason to reject Dr. Vigeland’s opined limitation does not reach the  
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1 level of specificity necessary to justify rejecting the opinion and is insufficient for this Court to  
2 determine if the ALJ properly considered the evidence. Without more, the ALJ's third reason to  
3 reject Dr. Vigeland's opinion has failed to meet the level of specificity required to reject a  
4 physician's opinion. *See Orn v. Astrue*, 495 F.3d 625, 632 (9th Cir. 2007) ("[t]he ALJ must do  
5 more than offer his conclusions. He must set forth his own interpretations and explain why they,  
6 rather than the doctors', are correct.") (citing *Embrey*, 849 F.2d at 421–22).

7 Finally, the ALJ's fourth reason to reject Dr. Vigeland's opinion is that the jobs the  
8 vocational expert listed in his testimony do not require climbing ladders, ropes, or scaffolding.  
9 AR 31. In discounting Dr. Vigeland's opinion for this reason, the ALJ did not discuss Dr.  
10 Vigeland's findings, evidence that shows Plaintiff is able or unable to climb, or how such  
11 evidence is contrary to Dr. Vigeland's opinion. AR 31. The ALJ further failed to include this  
12 limitation when posing hypothetical questions to the vocational expert. AR 61–62. The ALJ's  
13 failure to discuss this significant, probative evidence is error. The ALJ "need not discuss all  
14 evidence presented." *Vincent ex rel. Vincent v. Heckler*, 739 F.2d 1393, 1394–95 (9th Cir. 1984).  
15 However, the ALJ "may not reject 'significant probative evidence' without explanation." *Flores*,  
16 49 F.3d at 570–71 (quoting *Vincent*, 739 F.2d at 1395). The "ALJ's written decision must state  
17 reasons for disregarding [such] evidence." *Id.* at 571. Therefore, the ALJ's failure to discuss Dr.  
18 Vigeland's opined climbing limitation and rejection of this limitation without a specific and  
19 legitimate reason is error.

20 "[H]armless error principles apply in the Social Security context." *Molina v. Astrue*, 674  
21 F.3d 1104, 1115 (9th Cir. 2012). An error is harmless, however, only if it is not prejudicial to the  
22 claimant or "inconsequential" to the ALJ's "ultimate nondisability determination." *Stout v.*  
23 *Commissioner, Social Security Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *see Molina*, 674  
24

1 F.3d at 1115. The determination as to whether an error is harmless requires a “case-specific  
2 application of judgment” by the reviewing court, based on an examination of the record made  
3 “‘without regard to errors’ that do not affect the parties’ ‘substantial rights.’” *Molina*, 674 F.3d at  
4 1118-1119 (quoting *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009)).

5 Had the ALJ included all of Dr. Vigeland’s limitations in the RFC, Plaintiff may have  
6 been found disabled. For example, the jobs testified to by the vocational expert at the hearing did  
7 not have a climbing or stooping limitation. AR 61–62. The vocational expert’s testimony may  
8 have changed had the ALJ included Dr. Vigeland’s climbing and stooping limitations. The jobs  
9 further required Plaintiff perform at a medium exertional level. AR 62. Medium work is defined  
10 as involving the lifting of no more than fifty pounds at a time with frequent lifting or carrying of  
11 objects weighing up to twenty-five pounds. 20 C.F.R. §§ 404.1567(c), 416.967(c). The  
12 vocational expert’s testimony may have changed had the ALJ included Dr. Vigeland’s twenty-  
13 pound lifting limitations. Therefore, if some or all of the limitations opined by Dr. Vigeland were  
14 included in the RFC and in the hypothetical questions posed to the vocational expert, Thomas  
15 Weiford, the ultimate disability determination may have changed. Accordingly, the undersigned  
16 finds the ALJ’s error is not harmless and requires reversal.

17 **II. Whether the ALJ erred by failing to further develop the record.**

18 Plaintiff contends the ALJ erred by failing to fully develop the record by ordering a  
19 consultative physical examination of Plaintiff. Dkt. 11 at 7–10.

20 “An ALJ’s duty to develop the record further is triggered only when there is ambiguous  
21 evidence or when the record is inadequate to allow for proper evaluation of the evidence.” *Mayer*  
22 *v. Massanari*, 276 F.3d 453, 459–60 (9th Cir. 2001). Where the record, taken as a whole, is  
23 adequate to evaluate a claimant’s alleged impairment, the ALJ’s duty to develop the record is not  
24

1 implicated. *See Baghoomian v. Astrue*, 319 F. App'x 563, 566 (9th Cir. 2009). One of the means  
2 available to an ALJ to supplement an inadequate medical record is to order a consultative  
3 examination, *i.e.*, “a physical or mental examination or test purchased for [a claimant] at [the  
4 Social Security Administration's] request and expense.” *Reed v. Massanari*, 270 F.3d 838, 841  
5 (9th Cir. 2001); 20 C.F.R. §§ 404.1519, 416.919. Within this regulatory framework, the  
6 Commissioner “has broad latitude in ordering a consultative examination.” *Id.* (*citing Diaz v.*  
7 *Sec'y of Health and Human Servs.*, 898 F.2d 774, 778 (10th Cir. 1990)).

8         Here, the ALJ stated Plaintiff has the RFC to perform medium work except that Plaintiff  
9 should avoid concentrated exposure to airborne irritants such as gases, dusts, fumes, or odors.

10 AR 27. Plaintiff contends the ALJ's decision that he can perform at the medium exertional level  
11 was not based on substantial evidence in the record. Dkt. 11. As discussed *supra*, the  
12 undersigned recommends the Court order the ALJ to re-evaluate this entire matter on remand,  
13 completing each step of the sequential evaluation process, which will include re-evaluating all  
14 the medical opinion evidence. Therefore, the undersigned recommends the Court decline to  
15 examine the merit of Plaintiff's consultative physical examination argument at this time, and  
16 decline to make any determination on whether or not the ALJ failed to fully develop the record.  
17 Nevertheless, as this matter is already being remanded, the undersigned recommends the Court  
18 direct the Commissioner to determine whether a consultative physical examination is warranted.

19 **III. Whether the ALJ erred in omitting a limitation from the RFC assessment to**  
20 **account for Plaintiff's cane use.**

21         Plaintiff contends the ALJ erred in omitting Plaintiff's cane use limitation from the RFC  
22 assessment. Dkt. 11 at 10–11. As discussed above, the undersigned concludes the ALJ  
23 committed harmful error when he failed to properly consider the opinion of Dr. Vigeland. *See*  
24 Section I, *supra*. Should the Court agree, the ALJ will be required to reassess the RFC on

1 remand. *See* Social Security Ruling 96-8p (“The RFC assessment must always consider and  
2 address medical source opinions.”); *Valentine v. Comm’r of Soc. Sec. Admin.*, 574 F.3d 685, 690  
3 (9th Cir. 2009) (“an RFC that fails to take into account a claimant’s limitations is defective”); *see*  
4 *Watson v. Astrue*, 2010 WL 4269545, \*5 (C.D. Cal. Oct. 22, 2010) (finding the ALJ’s RFC  
5 determination and hypothetical questions posed to the vocational expert defective when the ALJ  
6 did not properly consider a doctor’s findings). Therefore, the undersigned recommends, on  
7 remand, the ALJ be directed to reconsider Plaintiff’s cane use and determine if this limitation  
8 should be included in the RFC assessment.

#### 9 CONCLUSION

10 Based on the above stated reasons, the undersigned recommends the Court vacate the  
11 Commissioner’s final decision in its entirety and remand this matter pursuant to sentence four of  
12 42 U.S.C. § 405(g) for a *de novo* hearing consistent with this Report and Recommendation. The  
13 undersigned also recommends judgment be entered for Plaintiff and the case be closed.

14 Pursuant to 28 U.S.C. § 636(b)(1) and FED. R. CIV. P. 72(b), the parties shall have  
15 fourteen (14) days from service of this Report to file written objections. *See also* FED. R. CIV. P.  
16 6. Failure to file objections will result in a waiver of those objections for purposes of *de novo*  
17 review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit  
18 imposed by Rule 72(b), the clerk is directed to set the matter for consideration on August 25,  
19 2017, as noted in the caption.

20 Dated this 8th day of August, 2017.

21 

22 \_\_\_\_\_  
23 David W. Christel  
24 United States Magistrate Judge